CONOCO, INC. ET AL. (ON RECONSIDERATION)

IBLA 87-102 Decided March 4, 19990

Petition for reconsideration of a Board decision in Conoco, Inc. et al., 102 IBLA 230 (1988), setting aside and remanding a decision of the Director, Minerals Management Service, affirming Royalty Management Program assessments levied for late reporting of sales and royalty remit-tances. MMS-86-0188-OCS, MMS-86-0189-OCS.

Petition for reconsideration granted; Board decision vacated in part; decision of Director, Minerals Management Service, affirmed in part.

1. Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties--Oil and Gas Leases: Royalties: Generally--Outer Continental Shelf Lands Act: Oil and Gas Leases

   The procedural safeguards applicable to civil penalties assessed pursuant to 30 U.S.C. § 1719 (1982) do not apply to late reporting assessments levied pursuant to 30 CFR 218.40.

2. Federal Oil and Gas Royalty Management Act of 1982: Generally--Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties--Oil and Gas Leases: Royalties: Generally--Outer Continental Shelf Lands Act: Oil and Gas Leases

   The party choosing the means of delivery of a document must accept the responsibility for and bear the consequences of that choice, including the possibility of delay or nondelivery.

3. Oil and Gas Leases: Generally--Regulations: Force and Effect as Law--Regulations: Validity

   The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

APPEARANCES: Robert M. Craig III, Esq., Houston, Texas, for Tenneco Oil Company; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., and Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Minerals Management Service (MMS) seeks Board reconsideration of a portion of its decision in Conoco, Inc., 102 IBLA 230 (1988). In that decision the Board set aside various MMS decisions affirming Royalty Management Program (RMP) assessments levied for erroneous and/or late report-ing on Form MMS-2014, and remanded the cases to MMS for reconsideration and application of revised late and erroneous reporting regulations which had been promulgated while the appeals were pending. See 53 FR 27545-47 (July 22, 1987). The Board reasoned that application of the revised regulations could reduce the amount of the assessments.

Among the decisions of the Director, MMS, set aside and remanded was a decision assessing $7,700 for Tenneco Oil Co.'s late reporting on Form MMS-2014 (Report of Sales and Royalty Remittance). (MMS-86-0188-OCS, MMS-86-0189-OCS.) MMS seeks reconsideration of Conoco, Inc., supra, only as it relates to its Tenneco decisions and does not seek reconsideration of the other cases addressed in the Conoco decision.

In Conoco, Inc. the Board considered 30 CFR 218.40(a) (1986) (formerly 30 CFR 218.56(a)) which provides that "[a]n assessment of $10.00 per day may be charged for each report not received by MMS by the designated due date" (emphasis added). The revised 30 CFR 218.40(a) provides that "[a]n assessment of an amount not to exceed $10 per day may be charged for each report not received by MMS by the designated due date" (emphasis added). Both the former and the current regulations define a report "as each line item on a Form MMS-2014." 30 CFR 218.40(c). The current regulations also state:

> The amount of the assessment to be imposed pursuant to paragraphs (a) and (b) of this section shall be established periodically by MMS. The assessment amount for each violation will be based on MMS's experience with costs and improper reporting. The MMS will publish a Notice of the assessment amount to be applied in the Federal Register.

30 CFR 218.40(e). Pursuant to this provision, on July 22, 1987, MMS published a notice in the Federal Register establishing a $10 per month assessment for late reporting, based on actual costs incurred. 52 FR 27593 (July 22, 1987).

MMS bases its request for reconsideration on its determination that, in the case of the assessment levied against Tenneco, the late reporting assessment would be the same under the revised regulations as it was under the old regulations. Although MMS could have charged Tenneco $10 per report per day for 3 days under the old regulations, MMS only assessed one $10 charge per report for its 770 late reports, result-ing in a total assessment of $7,700. Under the revised regulations the reports were less than a full month late and the assessment would also be

$10 per late report, or $7,700. Because the amount assessed under both the old and the new regulations is the same, we grant MMS' request for reconsideration and vacate Conoco, Inc., supra, as to, but only as to, the Tenneco appeals (identified as MMS-86-0188-OCS, MMS-86-0189-OCS). 1/

We will now consider the merits of Tenneco's appeal from the August 22, 1986, decision of the Director, MMS. The relevant facts are not in dispute. Tenneco completed its January 1986 Forms MMS-2014 2/ on Thursday, January 30, 1986, and arranged to have Federal Express pick up the forms that day for delivery on January 31, 1986, the due date. Through no fault of Tenneco, Federal Express failed to make the scheduled pick up on January 30, and the forms were received by MMS on February 4, 1986.

By letters and bills for collection dated March 3, 1986, the RMP notified Tenneco that it had submitted late January 1986 Forms MMS-2014. After citing the applicable regulations, the RMP assessed Tenneco $10 per line for those lines which were received by MMS after the due date, i.e., $5,010 for the 501 assessable lines in MMS-86-0188-OCS and $2,690 for the 269 assessable lines in MMS-86-0189-OCS, 3/ for a total of $7,700. In the latter case the MMS letter explained that Tenneco's failure to file timely reports not only "impaired [MMS'] ability to disburse royalties and provide an accurate explanation of payments to the appropriate recipient within the time period as required by the Federal Oil and Gas Royalty Management Act of 1982," but also "increased the possibility of [MMS] having to pay interest on late disbursements."

Tenneco appealed to the Director, MMS, arguing that it had prepared the forms in a timely manner, but, through no fault on its part, Federal Express had failed to make the scheduled pick up on January 30, 1986. Tenneco attached a copy of a letter from Federal Express admitting that the failure was totally its responsibility. Tenneco contended that the imposition of the late assessment served no beneficial purpose and should be rescinded because it timely prepared the forms and they were late through no fault of it or MMS.

1/ We note that our prior decision merely directed MMS to reconsider its prior decision in light of the new regulations. MMS reconsidered its prior decision and then filed its motion for reconsideration. If MMS had issued a new decision applying the revised regulations, Tenneco may well have agreed with that decision. In that case there would have been no necessity for either the motion for reconsideration or reconsideration by this Board. This would clearly have resulted in a saving of both time and expense. If Tenneco had appealed, we doubt that the cost would have been any greater than the cost incurred as a result of the petition for reconsideration.

2/ Apparently, Tenneco prepared three January 1986 Forms MMS-2014, one is the subject of MMS-86-0188-OCS and two are contained in MMS-86-0189-OCS.

3/ MMS-86-0189-OCS was originally docketed as MMS-86-0189-IND.

In his August 22, 1986, decision, the Director consolidated the two appeals due to the identity of the issues presented. He noted that the regulations require that a Form MMS-2014 accompany all royalty pay-ments to MMS and provide for the assessment of $10 per day for each late report received by MMS. He rejected Tenneco's argument that no assess-ment should be imposed because the late report filings were the result of Federal Express' failure, and not because of fault on Tenneco's part, citing James B. Pauley, 53 IBLA 1 (1981), for the principle that one who chooses the means of delivery of a document must accept the responsibility and bear the consequences of delay or nondelivery. He explained that the information contained on the forms is necessary to ensure timely payment to Indian lessors and to the states, and that late reports disrupt computerized data collection activities, increasing administrative costs. He further stated that "[l]ate reporting may also impair MMS's capacity to provide States and the Bureau of Indian Affairs with Explanation of Payment reports within the time frame specified in 30 CFR § 219.104." Accordingly, he denied Tenneco's appeals and affirmed the imposition of the $7,700 assessment.

In its statement of reasons for appeal, Tenneco first points out that the assessment at issue was based solely on its filing late reports, noting that the underlying royalty payments were timely made by wire transfer. It argues that MMS lacks statutory authority to impose assessments under 30 CFR 218.40, because such assessments are actually penalties, and Congress estab-lished the procedure to be followed in assessing penalties in the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1719 (1982). Tenneco asserts that FOGRMA provides the only statutory authority for the assessment of penalties for royalty payments and that MMS' penalty assessment does not comply with the statutory procedures. Therefore, Tenneco contends that the assessment must be reversed.

Tenneco also alleges that late assessment is inappropriate under the unique circumstances presented here. It argues that a penalty is assessed to deter the occurrence of a particular act. Tenneco argues that it took every reasonable step to ensure timely filing, and the late filing was due to Federal Express' failure to make a scheduled pick up, a matter beyond Tenneco's control. It asserts that imposition of the assessment would not deter future late reports. Tenneco distinguishes James B. Pauley, supra, on the ground that, in that case, the documents were not presented to the Postal Service until after the applicable time period had expired, while here Tenneco timely provided the documents to a reputable carrier.

Alternatively, Tenneco contends that the assessment amount must be reduced. It asserts that only one report, the Form MMS-2014, was not timely filed, and that the assessment, therefore, should be $10. Tenneco argues that 30 CFR 218.40(c), which defines a report as each line item on a Form MMS-2014, is arbitrary and capricious and is completely contrary to the common usage of the word and its dictionary definition. Tenneco further alleges that the wording of Form MMS-2014 states that it is one report and that the instructions on the back of the form reinforce this view. Tenneco

concludes that a report must be all pages comprising a Form MMS-2014, and that, if any assessment is appropriate, it must be limited to $10. 4/

In its answer, MMS counters that late reporting assessments are liquidated damages designed to reimburse MMS for the costs it incurs as a result of the late reporting, and not penalties. MMS notes that its authority for imposing assessments is not found under the civil penalty provision of FOGRMA. MMS also points out that FOGRMA explicitly provides that FOGRMA civil penalties are supplemental to, and not in derogation of, penalties authorized by any other provision of law. 30 U.S.C. § 1753(a) (1982). MMS argues that 30 CFR 218.56 (1984) was adopted pursuant to the general authority to promulgate necessary rules and regulations found in the Mineral Leasing Act (MLA), 30 U.S.C. § 189 (1982), the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1334(a) (1982), and the Mineral Leas-ing Act for Acquired Lands, 30 U.S.C. § 359 (1982), and that this authority was indicated at 49 FR 37340 (Sept. 21, 1984). MMS asserts that the regulations providing for the imposition of an assessment for late reporting were promulgated to implement the royalty management system for Federal oil and gas leases, and are necessary to defray costs incurred when reports are received late. 5/ Additionally, MMS contends that the imposition of the late reporting assessment is fully consistent with FOGRMA's stated purpose of improving the collection and distribution of royalties. 30 U.S.C. § 1701(b) (1982).

MMS argues that Tenneco is incorrect in contending that the entire Form MMS-2014, and not each line item, is a report. MMS notes that each line on the form presents detailed information for an operating unit (such as a lease or sublease), including an identification of the product sold, its value, the royalty share, and the value of the royalty share, and that it is possible to have reports for 13 separate leases on one page of the Form MMS-2014. If Tenneco's definition of a report were accepted, MMS posits that information on numerous leases in different states could be late, but MMS would only be able to assess $10 for the entire form. MMS contends that this amount would not even begin to reimburse MMS for the costs created by the late reporting. In any event, MMS asserts that 30 CFR 218.40 is a duly promulgated regulation of the Department, it is binding on the Board, and the Board lacks authority to declare it invalid.

Finally, MMS argues that the assessment is proper. MMS contends that the Board has consistently held that one who chooses the means of delivery must bear the responsibility and the consequences of delay or nondelivery, citing Rachel G. Conover, 75 IBLA 32 (1983), in which the document was

---

4/ In its Notice of Appeal Tenneco requested oral argument. The issues have been sufficiently presented in the statement of reasons and answer, and we find no need for oral argument. Tenneco's request is denied.

5/ MMS also notes that, although the royalty payments were timely, when the information supplied on the Form MMS-2014 is not timely received, the payments will be placed in a suspense account until the lease information arrives. This could lead to an untimely payment to a state, and in such case the provisions of FOGRMA (30 U.S.C. § 1721(b) (1982)) require payment of interest to the state to compensate for the late payment. MMS contends that it is therefore irrelevant that the royalty payments were timely.

timely delivered to the Postal Service, but was never received. MMS asserts that Tenneco's late filing cannot be excused and the imposition of the $7,700 assessment must be affirmed.

[1] The regulations provide that a completed Form MMS-2014 must accompany all royalty payments to MMS, and that the form and payment are due by the end of the month following the production month. 30 CFR 210.52 and 218.50. There is no dispute that the Forms MMS-2014 at issue here were due no later than January 31, 1986, or that they were not received by MMS until February 4, 1986. 30 CFR 218.40(a) authorizes assessment of an amount not to exceed $10 per day for each report not received by MMS by the designated due date. The provisions of 30 CFR 218.40(e) set out the procedure for establishing the assessment amount. MMS has established a $10 per month assessment for late reports submitted under the Auditing and Financial System, which includes Forms MMS-2014. 52 FR 27593 (July 22, 1987). The reg- ulations define a report "as each line item on a Form MMS-2014." 30 CFR 218.40(c).

Tenneco argues that there is no statutory authority for the late reporting assessments if they are not classified as civil penalties, and that the assessments here are invalid because they were imposed without the procedural safeguards mandated by FOGRMA, 30 U.S.C. § 1719 (1982). We disagree. The language of FOGRMA directly contradicts Tenneco's assertion that FOGRMA is the sole statutory authority for assessments relating to Federal oil and gas royalty payments. "The penalties and authorities provided in [FOGRMA] are supplemental to, and not in derogation of, any penalties or authorities contained in any other provision of law." 30 U.S.C. § 1753(a) (1982).

The late reporting assessments are not penalties designed to punish and deter violations, but are in the nature of liquidated damages imposed to compensate MMS for the costs incurred as a result of the late reports. See 52 FR 27545-46 (July 22, 1987). When promulgating these regulations, MMS stated that the Secretary's authority for the assessments derived, not from FOGRMA's civil penalty provisions, but from the Secretary's responsibilities to administer the MLA, the OCSLA, and other mineral leasing laws. 49 FR 37336, 37340 (Sept. 21, 1984).

The mineral leasing laws provide ample statutory authorization for these assessments. Specifically, the MLA, 30 U.S.C. § 189 (1982), authorizes the Secretary "to prescribe necessary and proper rules and regula-tions and to do any and all things necessary to carry out and accomplish the purposes" of the Act. Similarly the OCSLA, 43 U.S.C. § 1334(a) (1982), grants the Secretary the authority to "prescribe such rules and regulations as may be necessary to carry out" the provisions of the OCSLA. The Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 359 (1982), grants the Secretary similar authority. Because MMS is required by statute and regulation to share the royalty payments it receives with Indian lessors and the states and to provide the Indian tribes and states with timely explanations of those payments (see 30 CFR Part 219), these broad statutory grants of regulatory authority support the promulgation of regulations designed to compensate MMS for the added costs it incurs in complying with these duties as a result of late reporting.

Additionally, we note that, long before the enactment of FOGRMA, the Department's regulations provided for the assessment of liquidated damages for late royalty reports. See 30 CFR 221.54(j)(2) (1949). Accordingly, the procedural protection afforded by FOGRMA does not apply to late reporting assessments imposed under 30 CFR 218.40. Cf. M. John Kennedy, 102 IBLA 396 (1988) (assessments levied pursuant to the oil and gas operating regulations in 30 CFR Subpart 3160 are not subject to the procedural safeguards established by FOGRMA).

[2] Tenneco's argument that no assessment should be levied here because the late delivery was the fault of Federal Express and not Tenneco must fail. The Board has consistently held that one choosing the means of delivery of a document must accept the responsibility for and bear the consequences of delay or nondelivery. See, e.g., Union Exploration Partners, Ltd., 112 IBLA 140 (1989); Paul E. Hammond, 87 IBLA 139 (1985); Elmer F. Brewster, 63 IBLA 51 (1982); Carl B. Andersen, 61 IBLA 4 (1981); James B. Pauley, supra. Tenneco's attempt to distinguish Pauley is unpersuasive. The Board has applied this rule to cases where the documents were presented in a timely manner but arrived late. See, e.g., Paul E. Hammond, supra; Elmer F. Brewster, supra; Carl B. Andersen, supra. Accordingly, Tenneco bears the consequences of the delay in delivery.

[3] We also reject Tenneco's assertion that only $10 can be assessed because the entire Form MMS-2014 must be considered only one report. 6/ The regulations at 30 CFR 218.40(c) clearly define a report as being each line item on a Form MMS-2014. This Board has no authority to declare invalid duly promulgated regulations of the Department. Such regulations have the force and effect of law and are binding on the Department. Coastal States Energy Co., 110 IBLA 179 (1989); Veola & Aaron Rasmussen, 109 IBLA 106 (1989); Western Slope Carbon, Inc., 98 IBLA 198 (1987). See also GeoResources, Inc., 107 IBLA 311, 96 I.D. 77 (1989). Therefore, we find that MMS correctly applied 30 CFR 218.40 when it assessed Tenneco $7,700 for 770 late reports.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, MMS' request for reconsideration is granted, the Board's decision in Conoco, Inc., supra, is vacated as to, but only as to, the consolidated Tenneco appeals (MMS-86-0188-OCS and MMS-86-0189-OCS), and the decision of the Director, MMS, in the consolidated Tenneco appeals (MMS-86-0188-OCS and MMS-86-0189-OCS) is affirmed.

R. W. Mullen
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

6/ Three Forms MMS-2014 were late. Even under Tenneco's reasoning, a $30 assessment would be appropriate.